

MCM CONSTRUCTION, INC.

Contractor's Position Paper  
Notice of Potential Claim  
No. 10  
Increase in Sales Tax

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DRB Hearing

February 12, 2010

Notice of Potential Claim No. 10

Increase in Sales Tax

**Contractor's Position Paper**

**BACKGROUND:**

MCM Construction, Inc. (MCM) and its subcontractors seek a change order and compensation for the extra costs incurred to perform the work of the Contract as a result of the mandate imposed by the State to pay additional sales tax of 1% on all material and services obtained after April 1, 2009, almost 2 years after the Contract was entered into between the Contractor and the State.

The State of California increased the sales and use tax by 1% effective April 1, 2009. The bids for this Contract were submitted on or about June 5, 2007. The Contract was awarded on or about July 16, 2007 and the Contract was approved by the State on or about August 7, 2007.

At the time of entering into the Contract, the State had not even adopted a budget for the 2007 - 2008 fiscal year. No one knew, not even the high powered people in State government, that an increase in State sales tax would be mandated during the life of the Contract.

When this Contract was bid, the Contractor was not aware and had no reason to believe that its costs of performing the work would be increased by the action of the State. While some changes are always anticipated, such changes are normally incorporated into the Contract by a Contract Change Order which includes adjustments of compensation.

In this case, the direction by the State has changed the cost of performing the work by imposing an additional cost of 1% to the cost of all material and services required to perform the Work. The Contractor had no way of anticipating this additional cost. While the Resident Engineer probably was not aware of this change, had anyone in the State contemplated or had knowledge of the change, it should have been disclosed in the Contract documents and it was not.

## **SUMMARY OF CONTRACTOR'S POSITION:**

- The Work, as that term is used in the Contract, includes all items shown or contemplated in the Contract to construct the improvement, including all changes made by the State.
- Each item of work, as shown in the Engineers Estimate, includes the furnishing of labor and materials required to complete the construction of the item of work.
- The State has now required the Contractor to pay an additional 1% for the materials that are to be provided as part of the Work of all items shown in the Contract including all changes directed by the State. The Work has been changed since the additional 1% cost of the material was not contemplated in the Contract.
- The Contractor is entitled to additional compensation for the costs of the material and services that were not contemplated in the Contract.

1. **The Work of the Contract is defined in Section 1-1.48 of the Standard Specification.**  
**That definition limits the Work to only what was contemplated in the Contract.**

Section 1-1.48 WORK of the Standard Specifications defines the term Work as follows:

All the work specified, indicated, shown or **contemplated in the contract** to construct the improvement, including all alterations, amendments or extensions thereto made by contract change order or other written orders of the Engineer. (Standard Specification Section 1-1.48; Emphasis Added)

Clearly, the increase in the cost of the materials required by the Work was not contemplated by the parties to the Contract. Certainly it was not contemplated by the Contractor and if it was contemplated by the State, then it should have been disclosed. There is nothing in the Contract documents that states that the costs of materials would be increased by 1% effective April 1, 2009.

Again, in Section 9-1.02 of the Standard Specifications, the Scope of Payment for the items of work is limited to what was contemplated in the Contract. Section 9-1.02 provides in pertinent part as follows:

### **9-1.02 SCOPE OF PAYMENT**

. The Contractor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract; ... (Standard Specification Section 9-1.02; Emphasis added)

All Contract terms that define the scope of the Work or the scope of the payment, limit the Contract compensation for the Work that was contemplated by the parties. Certainly, MCM Construction never contemplated an increase in its costs due to an increase in the sales tax, since it is not a common occurrence and MCM no basis to assume that the increase in sales tax would be directed by the State when it submitted its bid in early summer of 2007. There is no evidence that the State contemplated requiring the Contractor to pay an additional 1% for the costs of materials and services that are part of the work of the Contract.

### **2. Section 4-1.03C – Changes of Character Requires the State to Compensate the Contractor for Additional Costs Resulting from Directed Changes to the Work.**

Standard Specifications section 4-1.03C – Changes of Character of the Work provides as follows:

#### **4-1.03C Changes in Character of Work**

. If an ordered change in the plans or specifications materially changes the character of the work of a contract item from that on which the Contractor based the bid price, and if the change increases or decreases the actual unit cost of the changed item as compared to the actual or estimated actual unit cost of performing the work of that item in accordance with the plans and specifications originally applicable thereto, in the absence of an executed contract change order specifying the compensation payable, an adjustment in compensation therefore will be made in accordance with the following.

. The basis of the adjustment in compensation will be the difference between the actual unit cost to perform the work of that item or portion thereof involved in the change as originally planned and the actual unit cost of performing the work of the item or portion thereof involved in the change, as changed. Actual unit costs will be determined by the Engineer in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-1.03; or the adjustment will be as agreed to by the Contractor and the Engineer. The adjustment will apply only to the portion of the work of the item actually changed in character. At the option of the Engineer, the work of the item

or portion of item which is changed in character will be paid for by force account as provided in Section 9-1.03.

- If the compensation for an item of work is adjusted under this Section 4-1.03C, the costs recognized in determining that adjustment shall be excluded from consideration in making an adjustment for that item of work under the provisions in Section 4-1.03B, "Increased or Decreased Quantities."

- Failure of the Engineer to recognize a change in character of the work at the time the approved contract change order is issued shall in nowise be construed as relieving the Contractor of the duty and responsibility of filing a written protest within the 15 day limit as provided in Section 4-1.03A, "Procedure and Protest."

This provision clearly contemplates that any directive of the State that results in a change in the cost of performing the work, even though a change order is not issued will require an adjustment in compensation based on the difference in the cost to perform the work as originally planned and the actual cost of the work as actually performed. There is no basis for the State to deny that the cost of the work has increased by the 1% additional tax on the cost of materials and services acquired after April 1, 2009. There certainly is no basis to deny that this increased cost was mandated by the State.

The contract provisions at Standard Specifications section 7-1.01 requires the Contractor to "comply with ... all existing and future laws" ... Section 7-1.01 does not require that the Contractor absorb the additional costs that may be incurred as a result for future laws imposed by the State. Section 7-1.01 does direct the Contractor to obey and comply with all laws and future laws and MCM Construction has fully complied with that directive, however the State has failed to comply with its contract obligation to compensate the Contractor as required by the Contract Standard Specification section 4-1.03 C.

### **3. No Provision of the Contract Exists that Requires the Contractor to Absorb the Costs of Increased Expenses resulting from a State Mandated Change.**

Caltrans letter of April 15, 2009, responding to MCM's Notice of Potential Claim No. 10, improperly cites Section 9-1.02 Scope of Payment as prohibiting the State from compensating the Contractor for the extra costs incurred as a result of the newly imposed sales tax mandated by the State. However, the State fails to acknowledge that application of Section 9-1.02 only applies to costs contemplated by the parties. Section 1-1.48 of the Standard Specifications also limits the Work to that which is contemplated by the Parties. There is no provision in the Contract that requires the Contractor to absorb the increased costs resulting from an act or directive of the State of California without an adjustment of compensation, when such act or directive of the State was unforeseen and/or not contemplated by the parties at the time of the formation of the Contract.

Contractor's Position Paper.

NOPC No.10 Reimbursement for State imposed Tax Increase

**4. Caltrans is responsible for Reimbursing the Contractor for the Costs Incurred as a Result of the State's Unilateral Action of Mandating Payment of Additional Sales Tax.**

The State of California is a party to this Contract and it was The State of California that enacted new laws to mandate additional sales taxes not contemplated by either party to the Contract at the time of entering into the Contract. This case is no different than the adoption of new work place regulations enacted by the Department of Industrial Relations back in October, 2000. (Wage Order No. 16) The new law regulating work place activities is the same as a new law requiring increased taxes. The Contract between the State of California and MCM Construction directs MCM to obey and comply with the new law. Whether the new law is a regulation adopted by the State or imposition of increased sales tax is not relevant. The new law is a change to the Contractor's burden of performing the work and is therefore a change to the contract not contemplated by the parties.

The DRB members may be well aware of the Arbitrator's Decision in regard to a contractor's claim for compensation for extra costs incurred as result of Wage Order No. 16, as it was well publicized in November, 2004. MCM contends that the reasoning of the Arbitrator in the case of the new labor law enacted in 2000 is applicable in the case of the State's enactment of a new law resulting in increases in costs on State contracts. It should be of no consequence whether the new law is enacted by the Legislature of the State or a regulatory agency of the State. The contract terms in both cases are identical; the provisions that direct the Contractor to comply with the new law and the State's responsibility to compensate the Contractor for the increased costs of the Work are all the same. The Arbitrator's Ruling on Entitlement in the case of the State's change in work rules is attached for the convenience of the Board member's and marked as Exhibit 9.

It should be noted that the Arbitrator in the matter of the changed work rule cites Sections 1-1.03C – Change In Character of the Work, 7-1.01 – Laws to be Observed and 4-1.03D – Extra Work as the contractual basis for the State's obligation to compensate the Contractor for the extra costs incurred by the enactment of a change in laws that impact the work.

In addition, the Arbitrator in Wage Order 16 case determined that the Contractor did not bear the risk of the unforeseen change. There, as well as in this case of an unforeseen change in the tax rates, the Contractor should not be held responsible to bear the risk of the unforeseen change. If Caltrans had intended to modify the contract requirements to shift the risk of unforeseen changes in law to the Contractor, it had over three years after the decision in Wage Order 16 to do so. Caltrans never took any steps to change the Standard Specifications in this regard. Accordingly, Caltrans has clearly represented to all bidders, since the Arbitrator's ruling in the matter of the changed work rule, that the Contractor was not responsible for the risk of changes in laws that impact the burden and expense of performing the Contract work.

Caltrans has implied that it accepted the reasoning and decision of the Arbitrator regarding assumption of the risk of unforeseen changes in the law by its failure to revise the provisions of the Contract that were the basis of the Arbitrator's decision. MCM submits that Caltrans purposely did not change the provisions of the Standard Specifications to expressly shift that burden to the Contractor in order to induce the Contractor's on future project to submit lower bids on fixed price contracts such as Contract 04-0120L4. This Contract between the State of California and MCM Construction, Inc. must be interpreted consistent with the Arbitrator's decision in the Wage Order 16 matter on the basis of the same contract provisions that were involved in both contracts.

Caltrans has long been prone to revise its specifications in response to Arbitrator's decisions rendered against Caltrans on contract claims in the past. Clear examples of such change in the Specifications include the gambit of revisions in the specifications involving CPM schedule requirements, the numerous revisions to the specifications regarding Notices of Potential Claims and continued tightening of the procedural provisions related to DRB proceedings. Clearly, if Caltrans intended to shift the burden of assumption of the risk for unforeseen changes in law from the State to the Contractor, they could have done so.

## **CONCLUSION**

The members of this Dispute Review Board are certainly qualified to understand the Standard Specifications and are experienced in matters of contract compliance and foreseeability of contract burdens. The members are also experienced in matters of equity and fairness. These are not legal terms but are contractual terms and terms that are part to the lives of parties to construction contracts. Clearly, when one party to a contract mandates a new requirement that increases the burden on compliance with the contract upon the other party, such an action results in an obligation to compensate the second party for its extra costs.

Contract 04-0120L4 is a written contract which constitutes "THIS AGREEMENT, made and concluded, in duplicate JUL 16, 2007 between the State of California, ..., the party of the first part, and MCM CONSTRUCTION, INC., party of the second part. " (Exhibit 10, Contract 04-0120L4, first page). The contract goes on to incorporate, among other documents, the Standard Specifications, dated July, 1999. The Standard Specifications relied upon by the Contractor in this contract are the same as those interpreted by the Arbitrator in the Wage Order 16 matter.

Clearly in all fairness to the Contractor, party of the second part and in equity, the State of California, party of the first part, with all its superior bargaining power, should be held responsible for the increased costs it caused to the Contractor by its mandate to pay increased

costs to perform that work on Contract 04-0120L4. Any other conclusion would be ignoring the terms of the Contract as expressly and impliedly represented by the State of California.

Respectfully submitted,

MCM CONSTRUCTION, INC.



**Main Office**

P.O. BOX 620 / 6413 32nd Street / North Highlands / CA 95660  
(916) 334-1221      Estimating / Engineering FAX (916) 334-0562  
Accounting FAX (916) 334-8355

**Southern California Regional Office**

P.O. BOX 867 / 19010 Slover Ave. / Bloomington / CA 92316  
(909) 875-0533      Engineering / Accounting FAX (909) 875-2243

April 8, 2009

State of California  
Department of Transportation  
345 Burma Road  
Oakland, CA 94607

Attn: Ben Ghafhgazi, R. E.

Re: Contract 04-0120L4  
Oakland Touchdown  
Notice of Potential Claim No. 10

Gentlemen:

Please consider this letter to be MCM Construction's Notice of Potential Claim No. 10. This Notice of Potential Claim relates to all cost impacts caused by the increase in Sales and Use Tax pursuant to Assembly Bill 3 (AB 3, Chapter 18 of 2009 Statute) as mandated by the State of California.

Section 4-1.03(c), "Changes," of the Standard Specifications allows the Department to make changes to the plans and specifications and to adjust compensation to the contractor accordingly. The passage of AB3 increased the state tax 1.00%, thus at bid time MCM could not have reasonably anticipated the additional costs necessary to complete the project once they were subject to the increased sales and use tax.

The State in their April 2, 2009 Memorandum rely on Standard Specification Sections 9-1.02, "Scope of Payment," and Section 7-1.03, "Payment of Taxes," to hold that that increased sales and use tax costs do not constitute a change in contract provisions. Although Section 7-1.03, "Payment of Taxes" states that full compensation to the contractor for all taxes is included in the contract prices, it does not mean that the contractor necessarily bears the risk of paying for the cost of compliance. Additionally, Section 9-1.02 requires the contractor only to assume the risk of unforeseen difficulties in the work "contemplated and embraced" by the contract. The 1% increase in use and sales tax was not "contemplated or embraced under the contract."

The State of California, as owner has the contractual authority to provide additional compensation for the impacts AB 3 has on project costs. Increased sales and use tax costs as directed by the State constitute a change in contract provisions; therefore the State should compensate the contractor for changes in tax rates.





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(909) 875-0533      Engineering / Accounting FAX (909) 875-2243

Attached is the Notice of Potential Claim No. 10, Form CEM-6201A, filed in accordance with Section 9-1.04, "Notice of Potential Claim" of the Standard Specifications as amended, for all cost impacts due to MCM and/ or their subcontractors.

Very truly yours,

MCM CONSTRUCTION, INC.

A handwritten signature in dark ink, appearing to read "E. Puchi". Below the signature, the name "Edm. E. Puchi" is printed in a small, serif font.

EDMUNDO A. PUCHI,  
Treasurer and General Counsel

cc:    Greg Allen  
      Chris Smith  
      Richard McCall  
      NOPC #9 File  
      JAC  
      HDM

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION  
**INITIAL NOTICE OF POTENTIAL CLAIM**  
CEM-6201A (NEW 9/2002)

FOR STATE USE ONLY			
Received By		Date	
(For Resident Engineer)			
TO <b>Ben Ghafhazi</b> (Resident Engineer)	CONTRACT NUMBER <b>04-0120L4</b>	DATE <b>April 7, 2009</b>	IDENTIFICATION # <b>NOPC 10</b>

This is An Initial Notice of Potential Claim for additional compensation submitted as required under the provisions of Section 9-1.04, "Notice of Potential Claim", of the Standard Specifications.  
The act of the Engineer, or his/her failure to act, or the event, thing, occurrence, or other cause giving rise to the potential claim occurred on

DATE **April 7, 2009**

The particular nature and circumstances of this potential claim are described as follows:

Please see attached letter dated April 7, 2009 for information.

The undersigned originator (Contractor or Subcontractor as appropriate) certifies that the above statements and attached documents made in full cognizance of the California False Claim Act, Government Code sections 12650 - 12655. The undersigned further understands and agrees that this potential claim to be further considered unless resolved, must fully conform to the requirements in Section 9-1.04 of the Standard Specifications and must be restated as a claim in the Contractor's written statement in conformance with Section 9-1.07B of the Standard Specifications.

**MCM Construction, Inc.**

Subcontractor of Contractor

(Circle One)

( Authorized Representative )

For subcontractor, notice of potential claim

*This notice of potential claim is acknowledged and forwarded by*

**MCM CONSTRUCTION, INC.**  
PRIME CONTRACTOR

  
( Authorized Representative )

**for E. PUGH**

CEM-6201 A (NEW 9/2002)

ADA Notice For individuals with sensory disabilities, this document is available in alternate formats. For information, call (916) 654-8410 or TDD (916) 654-3980 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento CA 95814

**DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program**

345 Burma Rd.  
Oakland, CA 94607  
(510) 286-0352, (510) 622-5165 fax



MCM CONSTRUCTION, INC.  
6413 32ND STREET  
NORTH HIGHLANDS, CA 95660

April 15, 2009

Contract No. 04-0120L4  
04-Ala-80-1.6/2.7  
Oakland Touchdown  
SFOBB-ESSSP

Attn: Mr. Greg Allen  
Project Manager

Letter No. 05.03.01-001474

**Subject: Response to NOPC No. 10  
MCM-TRN-000853R00**

Dear Mr. Allen,

We have reviewed MCM's letter dated April 8, 2009 regarding the Notice of Potential Claim No. 10.

MCM bases this claim on Standard Specification 4-1.03, "Changes", presuming that the Department directed an ordered change necessary for the proper completion of the work. The Assembly Bill 3 is not an ordered change to the contract that is necessary for the proper completion of the work. The increased sales and use tax costs do not constitute a change in contract provisions.

Your attention is directed to Standard Specifications sections 9-1.02, "Scope of Payment," and 7-1.03, "Payment of Taxes," which state that full compensation to the contractor for all taxes is included in the contract prices.

In reference to these specifications, the Department has no contractual or legal authority to provide additional compensation regardless of the Impacts AB 3 may have on project costs. Your claim No. 10 is therefore denied.

Please be advised that there is another Assembly Bill 1523 that is currently under review by the Committee of Revenue and Taxation that would make further changes to the State sales tax that would be beneficial to contractors with existing contracts. The Department has no objection should MCM wish to postpone the DRB hearing until voting has occurred on this new Bill.

Sincerely,

Ben Ghafghazi  
Resident Engineer

cc:

file: 05.03.01  
62.00

EXHIBIT

2

tabbles



**Main Office**

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Email & Mail

April 16, 2009

State of California  
Department of Transportation  
345 Burma Road  
Oakland CA 94607

Attn: Ben Ghafghazi, R. E.

Re: Contract No. 04-0120L4  
Bay Bridge Oakland Touchdown  
Response to NOPC 10

Gentlemen,

MCM is in receipt of the State's letter dated April 15, 2009 responding to MCM's NOPC 10. We do not agree with the State's position that the Department has no contractual or legal authority to provide additional compensation for the impacts AB 3 has on projects costs. It is our position that the April 1, 2009 sales and use tax increase effectively amounts to an owner initiated change by the State of California, creating an unforeseeable condition and change in the law outside the contemplation of both the parties at the time of contract, therefore the State should compensate the MCM for changes in tax rates.

MCM however agrees to hold the DRB hearing process in abeyance until after the legislature has taken action on the Bill 1523, which may resolve the aforementioned issue.

Very truly yours,

MCM CONSTRUCTION, INC.



GREG ALLEN  
Project Manager

CC: E. Puchi  
C. Smith  
R. McCall  
307 File 7.0/16.0



**DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program**

345 Burma Rd.  
Oakland, CA 94607  
(510) 286-0352, (510) 622-5165 fax



MCM CONSTRUCTION, INC.  
6413 32ND STREET  
NORTH HIGHLANDS, CA 95660

November 10, 2009

Contract No. 04-0120L4  
04-Ala-80-1.6/2.7  
Oakland Touchdown  
SFOBB-ESSSP

Attn: Mr. Greg Allen  
Project Manager

Letter No. 05.03.01-001718

**Subject: Response to NOPC No. 10**  
MCM-TRN-000853R00, MCM-TRN-000883R00

Dear Mr. Allen,

After further review of MCM's Initial NOPC #10 dated 04/08/09, and MCM's response to State letter 1474, the issue addressed on this NOPC #10 pertains to Assembly Bill 3, which provides for a 1% temporary increase in the statewide sales and use tax, it has been determined that the Department does not have the authority to decide on this dispute.

Further, this issue applies to another Department of the State of California that is responsible for tax collection, the California Board of Equalization, and is external to the contract. The dispute presented via NOPC # 10 did not arise from performance of the contract MCM has with the Department, but rather as a result of the independent governmental action of a sovereign act, the legislature of the State of California.

Please reference Sections 7-1.01, "Laws to be Observed", Section 7-1.03, "Payment of Taxes", and Section 9-1.02, "Scope of Payment", of the Standard Specifications.

Standard Specifications Sections 9-1.02, "Scope of Payment", and 7-1.03, "Payment of Taxes", state that full compensation to the Contractor for all taxes is included in the contract prices. The Department has no contractual authority to provide additional compensation regardless of the impacts AB3 may have on the project costs. Increased sales and use tax costs do not constitute a change in the contract provisions.

Additionally, section 7-1.01, "Laws to be Observed" of the Standard Specifications states that the Contractor shall keep fully informed of all existing and future state and federal laws as well as county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work.

If you wish to pursue the matter further, your attention is directed to the provisions of Section 4-1.03A, "Procedure and Protest", as well as Section 9-1.04, "Notice of Potential Claim" of the Standard Specifications, for the specified dispute procedures. Should MCM wish to schedule a DRB hearing, the formal DRB process will be followed.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ben Ghafghazi', with a long horizontal flourish extending to the right.

Ben Ghafghazi  
Resident Engineer



State Letter #:05.03.01-001718  
MCM CONSTRUCTION, INC.  
November 10, 2009  
Page 2 of 2

Contract: 04-0120L4  
04-Ala-80-1.6/2.7  
Oakland Touchdown

file: 05.03.01  
62.00

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(909) 875-0533

Engineering / Accounting FAX (909) 875-2243

November 30, 2009

State of California  
Department of Transportation  
345 Burma Road  
Oakland CA 94607

Attn: Ben Ghafghazi, R. E.

Re: Contract No. 04-0120L4  
Bay Bridge, Oakland Touchdown 1  
NOPC #10

Dear Mr. Ghafghazi:

Reference is made to the State's letter November 10, 2009 (Letter No. 05.03.01-001718) regarding MCM Construction's NOPC #10 related to the 1% increase in Statewide Sales and Use taxes.

MCM Construction, Inc. does not agree with the State's position regarding its responsibility to reimburse the Contractor for the additional costs of material imposed as a result of the 1% increase in Sales and Use taxes.

The Contractor's obligation under this Contract is to perform all WORK. The work related to all items on the Contract includes providing labor and materials. As a result of the 1% increase in Sales tax, the cost of the work has been impacted and therefore should be reimbursed under the terms of the Change In Character and Changes provisions of the Standard Specifications. Although MCM Construction is not willing to waive its rights for reimbursement for this additional cost of material, we do recognize that the Dispute Review Board may not be qualified to review this dispute and render an appropriate recommendation. MCM Construction will not waive its rights under the Notice of Potential Claim and DRB provisions of the Contract.

Accordingly, MCM Construction, Inc. proposes that Caltrans and MCM mutually agree to waive the provisions of the Dispute Review Board requirements under the Contract and agree that MCM reserves its rights to pursue this matter through the Proposed Final Estimate and claims provisions of the Contract. Please advise if Caltrans is willing to enter into such a mutual agreement. We believe this will expedite the process of concluding the Contract and avoid what may be needless costs of the Dispute Review Board procedures.

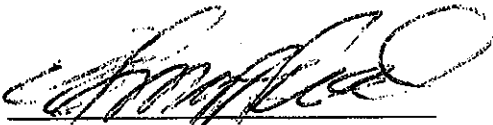
In the event that Caltrans does not agree with this proposal, please consider this letter as our Notice to the Dispute Review Board that we intend to request that they schedule a hearing on the matter of NOPC #10 related to the temporary increase of State Sales and Use tax.



Thank you for your courtesy and cooperation in this regard.

Very truly yours,

**MCM CONSTRUCTION, INC.**



**EMDUNDO A. PUCHI**  
Treasurer and General Counsel

Enclosure

cc: Amer Bata, Caltrans  
Tony Anziano, Caltrans  
Dave McCracken, DRB Chairman, Ron Reading,  
DRB Member, Heigo Orav, DRB Member  
Greg Allen HDM JAC R. McCall 307 File NPC #10

**DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program**

345 Burma Rd.  
Oakland, CA 94607  
(510) 286-0352, (510) 622-5165 fax



MCM CONSTRUCTION, INC.  
6413 32ND STREET  
NORTH HIGHLANDS, CA 95660

December 21, 2009

Contract No. 04-0120L4  
04-Ala-80-1.6/2.7  
Oakland Touchdown  
SFOBB-ESSSP

Attn: Mr. Greg Allen  
Project Manager

Letter No. 05.03.01-001756

**Subject: NOPC #10, DRB Hearing  
MCM-TRN-001283R00**

Dear Mr. Allen,

The Department is in receipt of MCM letter dated November 30, 2009 regarding NOPC #10. The Department does not agree to waive the provisions of the Dispute Review Board requirements as specified in Special Provisions section 5-1.12, "Dispute Review Board."

Your letter of November 30, 2009, and December 8, 2009, serves as notice to the DRB to request that they schedule a hearing on the matter of NOPC #10. A formal hearing can be scheduled with the Dispute Review Board as soon as possible after the quarterly meeting, which is to be held January 7, 2010. Please note that no DRB dispute meetings shall take place later than 30 days prior to acceptance of the contract.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ben Ghafghazi'.

Ben Ghafghazi  
Resident Engineer

cc:

file: 05.03.01,21.00, 62.00



**DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program**

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Oakland, CA 94607  
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MCM CONSTRUCTION, INC.  
6413 32ND STREET  
NORTH HIGHLANDS, CA 95660

January 04, 2010

Contract No. 04-0120L4  
04-Ala-80-1.6/2.7  
Oakland Touchdown  
SFOBB-ESSSP

Attn: Mr. Greg Allen  
Project Manager

Letter No. 05.03.01-001765

**Subject: NOPC 10 DRB Process Formal Hearing  
MCM-LTR-000555**

Dear Mr. Allen,

We are in receipt of MCM-LTR-000555 dated December 22, 2009. The Department's position is that this NOPC # 10 warrants a formal hearing by the Dispute Resolution Board. The issue can be added to the agenda for this upcoming Quarterly Meeting on January 7, 2010, for the DRB members to be aware that this will be discussed at a forthcoming hearing.

Please schedule a hearing with the DRB for this NOPC #10 at your earliest convenience.

Sincerely,

Ben Ghafghazi  
Resident Engineer

cc:

file: 05.03.01  
21.00, 62.00





Main Office

P.O. BOX 620 / 6413 32nd Street / North Highlands / CA 95660  
(916) 334-1221 Estimating / Engineering Fax (916) 334-0562  
Accounting Fax (916) 334-8355

Oakland Touchdown - Site Office  
450 Burma Road / Oakland CA 94607

22-Dec-2009

MCM-LTR-000555

Mr. Ben Ghafghazi  
Resident Engineer  
California Department of Transportation  
333 Burma Road,  
Oakland, CA 94607, USA

**PROJECT:** Oakland Touchdown  
Caltrans Contract No. 04-0120L4  
MCM Job No. 307

**SUBJECT:** Response to Letter 1756 - NOPC 10 DRB Process

Gentlemen:

We are in receipt of letter 1756 wherein the state does not agree to waive the provisions of the Dispute Review Board requirements as specified in the Special Provisions Section 5-1.12, "Dispute Review Board."

Please indicate whether or not the state would be willing to discuss this matter informally during our DRB status meeting scheduled for January 7<sup>th</sup>, 2010. MCM is scheduled to complete contract work mid-March of 2010. We are concerned that there may not be sufficient time to schedule a DRB meeting to resolve this issue prior to the acceptance of the contract.

Should you have any questions, please feel free to call me at 916-919-5323.

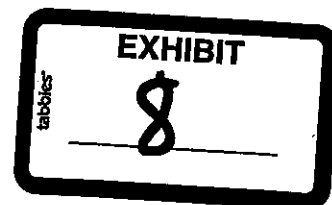
Sincerely,

MCM CONSTRUCTION, INC.

Chris Smith  
Project Engineer

cc: 307

File: E. Puchi, G. Allen



**FILED**

**OCT 22 2004**

Office of Administrative Hearings  
By *[Signature]*

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of:

FCI CONSTRUCTORS INC,

Petitioner,

v.

STATE OF CALIFORNIA,  
DEPARTMENT OF TRANSPORTATION,

Respondent.

OAH Case No.: A-003-04 and A-0024-03

Contract No. 04-133024

Contract No. 04-233924

**RULING ON ENTITLEMENT**

Kenneth C. Gibbs,  
Arbitrator

Petitioner FCI Constructors Inc. ("FCI") seeks a ruling on its claim for legal entitlement for additional compensation from Respondent State of California, Department of Transportation ("CalTrans") as a result of its compliance with California Industrial Wage Commission ("IWC") Order 16-2001 ("Wage Order 16"). The ruling set forth herein is limited to the issue of whether FCI is legally entitled to seek damages based upon the language of its contracts and applicable law. As this ruling is strictly limited to the issue of entitlement, and not the quantum of damages, it is irrelevant whether Wage Order No. 16 increased FCI's costs of performing the work by one or one million dollars and both parties reserve all arguments with respect to issues relating to quantum.

**EXHIBIT**

**9**

1 Having carefully reviewed and considered all evidence and legal arguments presented  
2 by the parties, it is the opinion of the arbitrator that the effect of Wage Order 16 was not  
3 contemplated nor embraced by the applicable contracts at the time of their award and was  
4 not included in either FCI's bid prices on these contracts or the contract sums. While both  
5 FCI and CalTrans are "innocent" parties, FCI should not be obligated to bear the risk of  
6 unforeseen changes in working conditions implemented by the State. As discussed in detail  
7 below, based on contract and public policy considerations, FCI is entitled to an equitable  
8 adjustment to compensate it for provable additional costs caused by the adoption of Wage  
9 Order 16 and its subsequent unforeseen impact on the projects.

10  
11 **I. BACKGROUND**

12 The factual background and procedural history before this arbitrator are not in dispute  
13 as the parties have entered into a set of Stipulated Facts. The Stipulated Facts include the  
14 following:

15 Assembly Bill ("AB") 60 was chaptered on July 21, 1999 as the Eight-Hour-Day  
16 Restoration and Workplace Flexibility Act of 1999. In section 10, AB 60 created Labor  
17 Code section 516, which provides that the IWC may adopt or amend working conditions  
18 orders with respect to break periods, meal periods, and days of rest for any workers in  
19 California.

20 Pursuant to Labor Code Section 516, on October 23, 2000, the IWC adopted Wage  
21 Order 16, which, among other things, provides for a ten minute rest period for construction  
22 workers for every four hours worked after January 1, 2001. Official notice of Wage Order  
23 16 was given on December 26, 2000. Prior to Wage Order 16, rest periods were not required  
24 for on-site occupations in the construction industry, and FCI was not a signatory to any  
25 collective bargaining agreement which required rest periods.

26 On March 30, 1998, nearly three years before the implementation of Wage Order 16,  
27 CalTrans had issued its invitation for bids for the construction of a highway interchange  
28 improvement at State Routes 580 and 680 (the "580/680 Project"), designated as Contract

1 No. 04-233924. On May 27, 1998, FCI submitted its bid for the 580/680 Project, and FCI  
2 was awarded the contract for the 580/680 Project on June 5, 1998. At the time of FCI's bid,  
3 there was no requirement for mandatory rest periods for on-site construction occupations.  
4 The 580/680 Project was completed after 2001. Prior to January 1, 2001, FCI did not  
5 provide two ten-minute rest periods to its workers each day, but beginning January 1, 2001,  
6 FCI did provide such rest periods, consistent with its obligations under Wage Order 16.

7 In January 2001, FCI requested a change order from CalTrans to cover alleged costs  
8 associated with extra work on the 580/680 Project incurred as a result of compliance with  
9 Wage Order 16. CalTrans denied FCI's request for a change order. FCI submitted its notice  
10 of potential claim ("NOPC 26") on April 11, 2001. Caltrans denied NOPC 26 and, on  
11 November 24, 2003, FCI received CalTrans' final Determination of Claims denying NOPC  
12 26 in its entirety. On January 28, 2004, FCI filed its complaint in arbitration on the 580/680  
13 Project.

14 On November 16, 1998, more than two years before the implementation of Wage  
15 Order 16, CalTrans issued its invitation for bids for the construction of certain earthquake  
16 retrofit measures for a specific portion of the San Francisco Bay Shore Via Duct (Bridge No.  
17 34 0088) on State Route 80 from Bryant Street to Sixth Street (the "I-80 Project"),  
18 designated as Contract No. 04-133024. On February 17, 1999, FCI submitted its bid for the  
19 I-80 Project, and on February 22, FCI was awarded the contract for the I-80 Project.

20 Construction on the I-80 Project began on February 23, 1999 and was completed April 2002.

21 On February 5, 2001, FCI requested a change order from CalTrans to cover alleged  
22 costs associated with the extra work on the I-80 Project incurred as a result of compliance  
23 with Wage Order 16. On March 19, 2001, CalTrans denied FCI's request for a change order.  
24 Thereafter, FCI timely submitted a notice of potential claim ("NOPC 14"), which was denied  
25 by CalTrans. On June 12, 2003, FCI received CalTrans' final Determination of Claims,  
26 denying NOPC 14 in its entirety. On September 9, 2003, FCI filed its complaint in  
27 arbitration on the I-80 Project.  
28

1 The parties have further stipulated that CalTrans' Standard Specifications dated July  
2 1992 ("Standard Specifications") apply to the contracts for both the 580/680 Project and the  
3 I-80 Project (collectively "the projects").  
4

5 **II. FCI HAS A CONTRACTUAL BASIS FOR RECOVERY OF ADDITIONAL**  
6 **COSTS**

7 CalTrans argues that FCI is not entitled to additional costs caused by Wage Order 16  
8 because CalTrans is not in breach of the contract, and has no other basis for recovery of  
9 additional compensation. The arbitrator agrees that CalTrans is correct when it argues that it  
10 did not breach any contract provision or statute by requiring FCI's compliance with changes  
11 in the labor requirements imposed by with Wage Order 16. At the time of the bids, neither  
12 FCI nor CalTrans did or could have anticipated IWC's implementation of a required ten-  
13 minute rest period for every four hours worked. Wage Order 16 constitutes a regulation  
14 based on a future law, and both CalTrans and FCI are equally "innocent parties" with respect  
15 to any additional costs incurred by FCI caused by the adoption of Wage Order 16.

16 Irrespective of any breach of contract, however, CalTrans' Standard Specifications do  
17 include specific provisions which entitle FCI to an equitable adjustment to compensate it for  
18 additional costs caused by the adoption of Wage Order 16, and its subsequent unforeseen  
19 impacts on the projects. As an initial matter, Standard Specification section 4-103C  
20 (Changes in the Character of the Work) allows an adjustment in compensation when an  
21 ordered change in the specifications materially changes the work from that which FCI based  
22 its bid price. Standard Specification section 4-1.03C provides, in relevant part, as follows:

23 If an ordered change in the plans or specifications materially changes the character of  
24 the work of a contract item from that on which the Contractor based his bid price, and  
25 the change increases or decreases the actual unit cost of such changed item as  
26 compared to the actual or estimated cost of performing the work of said item in  
27 accordance with the plans and specifications originally applicable thereto, in the  
28 absence of an executed contract change order specifying the compensation payable,  
an adjustment in compensation therefore will be made . . .



1 Standard Specifications section 4-1.03C. In this case, a material change in the character of  
2 the work, i.e. a change in work rules requiring rest periods, is precisely what occurred.

3 CalTrans contends that the changes clause is inapplicable because Wage Order 16 was  
4 adopted by the IWC and thus was not an "ordered change in the plans and specifications."  
5 While it was the IWC that implemented the requirement of rest periods after January 1,  
6 2001, CalTrans' own specifications **explicitly order** FCI's compliance with this change.  
7 Section 7-1.01 of the Standard Specifications mandates that FCI observe all existing and  
8 future laws and regulations, such as Wage Order 16, and hold the State harmless from any  
9 claim or liability arising from or based upon the violation of such laws or regulations. This  
10 specification requires, in pertinent part, as follows:

11 The Contractor shall keep himself fully informed of all existing and future  
12 State and Federal laws and county and municipal ordinances and regulations  
13 which in any manner affect those engaged or employed in the work, or the  
14 materials used in the work . . . **He shall at all times observe and comply with**  
15 **. . . all such existing and future laws, ordinances regulations, orders and**  
16 **decrees of bodies or tribunals having any jurisdiction or authority over**  
17 **the work; and shall protect and indemnify the State of California, and all**  
18 **officers and employees thereof connected with the work, including but not**  
19 **limited to the Director and the Engineer, against any claim or liability arising**  
20 **from or based on the violation of any such law, ordinance, regulation, order, or**  
21 **decree, whether by himself or his employees.**

22 Standard Specification section 7-1.01 (emphasis added).

23 It is stipulated by the parties that FCI at all times acted consistently with this  
24 contractual obligation by complying with Wage Order 16. Since FCI's compliance with  
25 Wage Order 16 was "ordered" by the Standard Specifications, and Wage Order 16 affected a  
26 material change in the character of the work, Standard Specification section 4-1.03C  
27 provides FCI a contractual basis for an equitable adjustment, even in the absence of any  
28 breach of contract by CalTrans.

29 In addition to the changes clause, Standard Specification 4-1.03D (Extra Work)  
30 provides, in relevant part, that "[n]ew and unforeseen work will be classed as extra work  
31 when determined by the Engineer that the work is not covered by any of the various items  
32 for which there is a bid price or by combinations of those items." While Wage Order 16 did

1 not increase the physical scope of work, it did materially alter work rules, resulting in new  
2 and unforeseen changes in working conditions and costs associated therewith not covered by  
3 FCI's bids.

4 Accordingly, FCI has contractual bases for recovery of additional costs. Even in the  
5 absence of any breach of contract by CalTrans, both Standard Specification section 4-1.03C  
6 and 4-1.03D entitle FCI to an equitable adjustment to compensate it for additional costs  
7 caused by the adoption of Wage Order 16, and its subsequent unforeseen impacts on the  
8 projects.

9  
10 **III. UNDER THE TERMS OF THE CONTRACT, FCI DOES NOT BEAR THE**  
11 **RISK OF AN UNFORESEEN CHANGE**

12 Standard Specification section 9-1.02 (Scope of Payment) specifically addresses the  
13 scope of compensation contemplated by the contract. It reads, in pertinent part, as follows:

14 The Contractor shall accept the compensation provided in the contract as full  
15 payment for furnishing all labor, materials, tools, equipment, and incidentals  
16 necessary to the completed work and for performing all work contemplated  
17 and embraced under the contract; also for any loss or damage arising from  
18 the nature of the work, or from the action of elements, or from any  
19 unforeseen difficulties which may be encountered during the prosecution  
20 of the work until acceptance by the Director and for all risks of every  
21 description connected with the prosecution of the work, also for all  
22 expenses incurred in consequence of the suspension or discontinuance of the  
23 work as provided in the contract; and for completing the work according to the  
24 plans and specifications. Neither the payment of any estimate nor of any  
25 retained percentage shall relieve the Contractor of any obligation to make good  
26 any defective work or material.

27 Standard Specification section 9-1.02 (emphasis added).

28 CalTrans argues that the language in section 9-1.02 states that FCI agreed to  
acceptance of "all risks of every description connected with the prosecution of the work." In  
CalTrans' view, all unforeseen difficulties, except for those specifically enumerated and

1 identified by other provisions in the specifications and/or the Public Contract Code,<sup>1</sup> are  
2 incurred at the contractor's expense. FCI, by contrast, contends that compensation provided  
3 for under the contracts is for "all work contemplated and embraced under the contract . . ."  
4 As such, Standard Specification section 9-1.02 requires the contractor to accept the risk of  
5 unforeseen difficulties in the performance of the contract work, but not to assume the risk of  
6 unforeseen difficulties due to changes in the contract work or changes to the methodology by  
7 which contract work is performed.

8 This arbitrator concludes that FCI's position is persuasive because it harmonizes  
9 section 9-1.02 as a whole. A consistent reading of the specification provides that, pursuant  
10 to section 9-1.02, FCI did accept "all risks of every description in connection with the  
11 prosecution of the work" but that assumption of risk encompassed only unforeseen  
12 difficulties in the work "contemplated and embraced" under the contract. Thus, although the  
13 "all risks" language relied on by CalTrans does have meaning, it is more limited than  
14 CalTrans implies because it is modified by the "contemplated and embraced" language in the  
15 initial clause of section 9-1.02.

16 FCI is not barred under the terms of section 9-1.02 from seeking an equitable  
17 adjustment to its contract due to a material change in its working conditions. This is not a  
18 case where FCI simply found the scope of work it agreed to perform under the contract to be  
19 more difficult than it anticipated at the time of its bid. FCI explicitly accepted the risk of  
20 unforeseen difficulties in the performance of its contract work under the "all risks" language  
21 in section 9-1.02. Here, FCI seeks additional compensation on the grounds that the rest  
22 periods required by Wage Order 16 constituted an unforeseen difficulty by affecting a  
23

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24 <sup>1</sup> See, e.g., Standard Specification section 5-1.116 allows for additional compensation for  
25 differing site conditions; Standard Specification section 4-1.03C recognizes that the  
26 contractor does not bear the risk for a change in the character of the work; Standard  
27 Specification section 4-1.03D shifts the risk from the contractor for extra work when it is  
28 new and unforeseen; Public Contract Code section 7102 prohibits public contracts which  
provide no damages for delay; Public Contract Code section 7104 requires that public  
contracts allow additional compensation to a contractor when differing site conditions are  
encountered.

1 change in work rules not contemplated and embraced by the contract. Neither FCI nor  
2 CalTrans could have anticipated the implementation of a required ten-minute rest period for  
3 every four hours worked at the time of the bidding, or at the award of the contracts. Because  
4 the rest periods subsequently required by Wage Order 16 were not contemplated and  
5 embraced by the contracts, they are an unforeseen difficulty for which FCI is not obligated to  
6 bear the risk.

7 Public policy considerations support this reading of the risk allocation language in  
8 Standard Specification section 9-1.02. The public maintains tremendous interest in securing  
9 the lowest competitive bids for public construction projects. It is decidedly against this  
10 interest to foster situations where contractors are forced to assume all risks of unforeseen  
11 difficulties of any nature. This would inevitably result in contractors including in their bids  
12 unknown sums for unanticipated contingencies, thereby inflating public bids by untold  
13 millions of contingency dollars. Public policy concerns dictate that contractors should not be  
14 cornered into submitting inflated bids in order to protect themselves from serious  
15 consequences as a result of compliance with unanticipated future laws. For all of these  
16 reasons, this arbitrator concludes that FCI did not assume the risk an unforeseen change in its  
17 working conditions as a result of the implementation of Wage Order 16.

18 As support for its position, CalTrans cites RUI One Corp. v. City of Berkeley (2004)  
19 371 F.3d 1137 for the proposition that compliance requirements in section 7-1.01 place the  
20 contractor on notice of the possibility of a change in the law, and thereby shifts the risk of  
21 cost increases to the contractor. Although CalTrans draws parallels to RUI, it is  
22 distinguishable from the case at bar.

23 In RUI, the City of Berkeley leased property on Marina's public trust tidelands for the  
24 operation of a restaurant. The Marina Amendment, enacted subsequent to the lease  
25 agreement at issue, required the corporation immediately to provide its employees with a  
26 Living Wage ordinance benefits. Id. at 1146. RUI challenged the constitutionality of  
27 requirements to comply with the Living Wage Ordinance. The court rejected RUI's claim,  
28 relying in part on a provision in the lease agreement providing that RUI will "comply with

1 all applicable ordinance[s] and regulations of the City.” Id. at 1150. As such, the court  
2 reasoned that “RUI was on notice that Berkeley could pass future ordinances that might  
3 adversely affect RUI’s expected benefits under the lease agreement.” Id. at 1153.

4 The court in RUI focused exclusively upon the question whether the private  
5 corporation had to comply with a future ordinance. Significantly, the court never reached the  
6 issue now before this arbitrator regarding allocation of costs associated with that compliance.

7 As in RUI, Standard Specification section 7-1.01 does contractually require FCI to  
8 comply with future laws and regulations, and to hold the State harmless in the event of  
9 noncompliance. Unlike the case before the court in RUI, however, there is no dispute here  
10 that FCI was required to and in fact did comply with Wage Order 16. Because the  
11 compliance clause in section 7-1.01 is silent upon the issue of cost increases, it neither  
12 obligates FCI to assume the financial risk of following a future law, nor immunizes CalTrans  
13 from the obligation to pay FCI for compliance with an unanticipated future regulation.

14 In summary, Standard Specification section 9-1.02 requires FCI to accept contract  
15 payments as full payments for all work contemplated and embraced under the contract. At  
16 the time of bidding this contract, mandatory rest period were neither contemplated nor  
17 embraced under the contract. However, section 7-1.01 requires that FCI had to comply with  
18 Wage Order 16. These provisions, read together, dictate that FCI should not be required to  
19 accept the contract payment as full payment for compliance with this unanticipated future  
20 regulation. Pursuant to the changes clause in section 4-1.03C or the extra work provision in  
21 section 4-1.03D, FCI is entitled to an equitable adjustment for additional work necessitated  
22 by Wage Order 16.

#### 23 24 **IV. THE SOVEREIGN ACTS DOCTRINE DOES NOT BAR FCI’S CLAIM**

25 CalTrans’ final argument is that, even if FCI is entitled to claim compensation for  
26 extra work under the contracts, Wage Order No. 16 was a regulatory act of the state for  
27 which CalTrans as contractor cannot be held liable under the Sovereign Acts Doctrine.  
28 CalTrans is correct in invoking the Sovereign Acts Doctrine to the extent that the acts of the

1 IWC in its regulatory capacity do not automatically and conclusively entitle FCI to recover  
2 from CalTrans as the state in a contracting capacity. However, the ultimate issue in this case  
3 is, under the contract, which party bears the burden of costs associated with compliance with  
4 Wage Order No. 16.

5 This arbitrator disagrees with the argument advanced by CalTrans asserting that  
6 Sovereign Acts Doctrine immunizes it from all liability. In United States v. Winstar (1996)  
7 518 U.S. 839, the United States Supreme Court affirmed an exception to the Sovereign Acts  
8 Doctrine when the parties expressly or impliedly contract to allocate the burden of costs  
9 associated with a state act. Id. at 909 ("It has long been established that while the United  
10 States cannot be held liable directly or indirectly for public acts which it performs as a  
11 sovereign, the Government can agree in a contract that if it does exercise a sovereign power,  
12 it will pay the other contracting party the amount by which its costs are increased by the  
13 Government's sovereign act, and that this agreement can be implied as well as expressed.")  
14 (Internal citations omitted.) .

15 In this case, the Standard Specifications section 7-1.01 mandates that FCI must  
16 comply with future laws, such as the implementation of rest periods as defined by Wage  
17 Order 16. Standard Specification section 9-1.02 provides compensation only for work  
18 contemplated and embraced under the contract, and not for other unforeseen difficulties such  
19 as a change in working conditions. In those circumstances, the parties agreed FCI would be  
20 entitled to additional compensation pursuant to the changes clause in section 4-1.03C or as  
21 extra work under section 4-1.03D. Under the terms of the contract, CalTrans thus agreed  
22 that it would pay FCI the amount by which its costs increased due to imposition of a future  
23 law such as the IWC's imposition of Wage Order 16. Pursuant to the exception recognized  
24 in Winstar, sections 7-1.01, 9-1.02, and 4-1.03 operate together in this case to shift the  
25 burden of the increased costs associated with a future state act from FCI, and the Sovereign  
26 Acts Doctrine does not bar FCI's claim.

1  
2 **V. CONCLUSION**

3 Wage Order 16 was neither contemplated nor embraced by the contracts at the time of  
4 award and was not included in FCI's the contract sums. Unforeseen changes in working  
5 conditions implemented by the State was not a risk assumed by FCI pursuant to its contracts  
6 on the projects, but rather a condition for which it can seek an equitable adjustment pursuant  
7 to the terms of its contracts. As a result of these contractual provisions and public policy  
8 considerations, FCI is entitled to an equitable adjustment in its contracts for the 580/680  
9 project and the I-80 project, in accordance with proof, to compensate it for unforeseen  
10 additional work after January 1, 2001 caused by IWC's implementation of Wage Order 16.  
11  
12  
13

14 DATED: October 21, 2004

By: 

Kenneth C. Gibbs, Esq.  
Arbitrator



STATE OF CALIFORNIA

## DEPARTMENT OF TRANSPORTATION

CONTRACT NO. 04-0120L4

THIS AGREEMENT, made and concluded, in duplicate, **JUL 16 2007**  
between the State of California, by the Department of Transportation thereof, party of the first part, and

### M C M CONSTRUCTION INC

6413 32ND STREET  
NORTH HIGHLANDS CA 95660

License: 286430

Class: A

Phone: (916)334-1221

Contractor, party of the second part.

**ARTICLE I.-- WITNESSETH**, That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the conditions expressed in the 2 bonds, bearing even date with these presents, and hereunto annexed, the said party of the second part agrees with the said party of the first part, at his own proper cost and expense, to do all the work and furnish all the materials, except such as are mentioned in the specifications to be furnished by said party of the first part, necessary to construct and complete in a good, workmanlike and substantial manner and to the satisfaction of the Department of Transportation, the work described in the special provisions and the project plans described below, including any addenda thereto, and also in accordance with the Department of Transportation Standard Plans, dated July, 2004, the Standard Specifications, dated July, 1999, and the Labor Surcharge And Equipment Rental Rates in effect on the date the work is accomplished, which said special provisions, project plans, Standard Plans, Standard Specifications, and Labor Surcharge And Equipment Rental Rates are hereby specially referred to and by such reference made a part hereof.

The special provisions for the work to be done are dated February 26, 2007 and are entitled:

**STATE OF CALIFORNIA; DEPARTMENT OF TRANSPORTATION; NOTICE TO CONTRACTORS AND SPECIAL PROVISIONS FOR CONSTRUCTION ON STATE HIGHWAY IN ALAMEDA COUNTY IN OAKLAND FROM 1.6 KM WEST OF THE TOLL PLAZA TO 0.3 KM WEST OF THE TOLL PLAZA**

The project plans for the work to be done were approved January 29, 2007 and are entitled:

**STATE OF CALIFORNIA; DEPARTMENT OF TRANSPORTATION; PROJECT PLANS FOR CONSTRUCTION ON STATE HIGHWAY IN ALAMEDA COUNTY IN OAKLAND FROM 1.6 KM WEST OF THE TOLL PLAZA TO 0.3 KM WEST OF THE TOLL PLAZA**

Type of Work: Construct bridge, roadway, building and electrical system.

